IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

SA.No. 693 of 1994(G)

(AGAINST THE DECREE AND JUDGMENT IN AS.264/1989 DATED 12/07/1994 OF THE DISTRICT COURT, TRIVANDRUM, REVERSING THE JUDGMENT AND DECREE IN OS.144/1984 OF THE ADDL.SUB COURT,TRIVANDRUM DATED 17/07/1989)

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APPELLANT: 1ST RESPONDENT:PLAINTIFF:

SHAMSUDEEN, S/O.MOHAMED ILLIAS,
RAFI MANZIL, KOLIYAKODU LANE,
KARAKKAMANDAPAM, NEMOM VILLAGE,
TRIVANDRUM.

BY ADV. SRI.N.SUKUMARAN
SRI.S.SHYAM

RESPONDENTS: APPELLANTS AND RESPONDENTS 2 TO 6 & 8 TO 12/DEFENDANTS:

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1. MOHAMMED SALIM, S/O.MOHAMMED IDRIS, VILAYIL PUTHEN VEEDU, CHULLIMANOOR DESOM, ANAND VILLAGE, NEDUMANGAD.

***2. SHAJAHAN, S/O.MOHAMMED IDRIS, ..DO...DO....(D I E D)- LR'S IMPLEADED:**

****3. SHUKKER OF ...DO...DO.... (DI E D)- LR'S IMPLEADED:**

4. MOHAMMED AJMAL, VILAYIL PUTHEN VEEDU, CHULLIMANOOR, ANAND, NEDUMANGAD.

5. LAILA, D/O. MOHAMMED IDRIS,...DO...DO....

6. BEENA, D/O.MOHAMMED IDRIS, ...DO..DO....

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7. SAIDAT, MADATHIL KIZHAKKETHIL, MEENATTUCHERRY, KAVANAD P.O., QUILON.

*****8. SAUDA BEEVI (VALLI AMMA), T.C.44/177,KAMALESWARAM, MANACAUD P.O., THIRUVANANTHAPURAM. (D I E D). NO LR'S NEED BE IMPLEADED:**

***** IT IS RECORDED AT THE RISK OF THE PETITIONER THAT 8TH RESPONDENT DIED AND NO LEGAL HEIRS ARE TO BE IMPLEADED AS PER ORDER DTD. 11/06/06 IN MEMO C.F.1117/06 DTD. 16/02/2006.**

9. R.NAJEEMA BAI, D/O.MOHAMMED IDRIS, KOCHUKARIKKAKOM VEEDU, ATTUKAL, PANAYAMUTTOM P.O., NEDUMANGAD.

10. R.JEEJA MOHAMMED, L.D.CLERK, DIRECTOR OF INDUSTRIES, VIKAS BHAVAN, THIRUVANANTHAPURAM.

******11. A.HYDER ALI, VILAYIL PUTHEN VEEDU, CHULLIMANOOR P.O., NEDUMANGAD (D I E D) LR'S RECORDED AND IMPLEADED:**

12. H.SEENA BEEGUM,..DO...DO....

13. JIJI MON (MINOR), ...DO...DO.... (UNDER THE GUARDIANSHIP OF A.HYDER ALI, THE 11TH RESPONDENT ABOVE NAMED)

******ADDL.R14 & R15 ARE IMPLEADED:**

R14. NOORJAHAN BEEGUM, W/O.BASHEER T.MUSTHAFFA, NOOBY VAS, LAKE VIEW LANE, VATTIYOORKAVU, TRIVANDRUM.

R15. SHANAWASKHAN, RESIDING AT....DO...

******R12 AND R13 ARE RECORDED AND ADDL.RESPONDENTS 14 AND 15 AS IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED REPONDENT NO.11 AS PER ORDER DTD. 25/08/2000 IN C.M.P.NO.1180/2000.**

S.A.NO.693/1994

** THE LEGAL REPRESENTATIVES OF DECEASED 3RD RESPONDENT:

R16. FOUSIYA, W/O.SHUKKER, AGED ABOUT 47 YEARS,
VILAYIL PUTHENVEEDU, CHULLIMANOOR DESOM,
ANAND VILLAGE, NEDUMANGAD.

R17. SHAHANA MOHAMMED, D/O.SHUKKER, AGED ABOUT 25 YEARS,
.....DO....DO.....

R18. RAHANA MOHAMMED, D/O. SHUKKER, AGED ABOUT 22 YEARS,
....DO.....DO.....

** THE LEGAL REPRESENTATIVES OF DECEASED 3RD RESPONDENT ARE IMPLEADED AS ADDITIONAL RESPONDENTS 16 TO 18 AS PER ORDER DTD. 1/06/06 IN I.A.137/05.

* THE LEGAL REPRESENTATIVES OF DECEASED 2ND RESPONDENT:

R19. SAINABA BEEVI, AGED 50, WIFE OF LATE SHAJAHAN,
SWAPNA MANZIL, THOZHNAMALA, CHULLIMANOOR P.O.,
NEDUMANGAD, TRIVANDRUM DISTRICT.

R20. SWAPNA, AGED 27, D/O.LATE SHAJAHAN,
...DO....DO....DO.....

R21. ARUN MOHAMMED, AGED 25 YEARS,
S/O.LATE SHAJAHAN, ...DO...DO...DO.....

*THE LEGAL REPRESENTATIVES OF DECEASED 2ND RESPONDENT ARE IMPLEADED AS ADDITIONAL RESPONDENTS 19 TO 21 AS PER ORDER DTD. 18/01/07 IN I.A.2101/06.

BY ADV. SRI.K.L.NARASIMHAN for R1,4,5,12,16,17,18
SRI.N.KRISHNA PRASAD

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/09/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.1480/1994 IN S.A.NO.693/1994

DISMISSED

5/09/2007 **SD/-M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 693 OF 1994

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DATED THIS THE 5th DAY OF SEPTEMBER, 2007

JUDGMENT

Whether the marriage between a Muslim male and a Hindu female is void ? Whether the child born in that relationship is legitimate and if so whether, the child will inherit the estate of the father ? These are the interesting questions to be decided in this second appeal.

2. Appellant instituted the suit before Sub Court, Thiruvananthapuram claiming partition and separation of his 14/16 shares in the plaint A schedule property and half right over plaint B schedule property. Plaint A and B schedule properties admittedly originally belonged to Mohammed Ilias. The case of appellant was that 8th defendant was the first wife of Mohammed Ilias and there was no issue in that wedlock and thereafter Mohammed Ilias married 9th defendant in 1120 M.E and they were residing together as husband and wife in House no.T.C.13 of Poojappura ward of Thiruvananthapuram and appellant was born to 9th respondent in that wedlock and after the death of Mohammed Ilias 9th defendant married Aliyarkunju and appellant is the only son of Mohammed Ilias and on his

death his rights devolved on appellant and first defendant, the brother of Mohammed Ilias and therefore each of them is entitled to one share in plaint B schedule property as the grandson of Zainam Beevi, themother of Mohamed Ilias and first defendant. He claimed that plaint A schedule property belonged to Mohammed Ilias and on his death, appellant is entitled to 14/16 shares and the remaining shares vest in defendants 8 and 9, the widows.

3. First defendant filed a written statement along with defendants 2 to 4 contending that 9th defendant is not the widow of deceased Mohammed Ilias and appellant is not the son born to 9th defendant in Mohammed Ilias and Mohammed Ilias did not marry 9th defendant and therefore appellant is not entitled to claim any share. It was also contended that plaint schedule properties and the remaining properties are in the absolute possession and enjoyment of first defendant, ever since the date of death of his brother Mohammed Ilias and their mother Zaina Beevi and first defendant executed a settlement deed in favour of defendants 2 to 7 and it is valid and binding and appellant is not entitled to any relief. 8th defendant filed a written statement admitting the plaint allegations that appellant is the son of Mohammed Ilias born to the 9th defendant.

4. Learned Sub Judge, on the evidence of Pws 1 to 4, DW1,

Exts.A1 to A6, B1 to B4 and X1 to X3, upheld the case of appellant and passed a preliminary decree declaring that appellant is the son of Mohammed Ilias and he is entitled to 14/16 shares in plaint A schedule property and half share in plaint B schedule property. Being the widow defendants 8 and 9 were found to be entitled to 1/16 share each in plaint schedule property. First defendant died during the pendency of the suit itself and defendants 2 to 7 were recorded as his legal heirs along with the defendants 10 to 12, who were additionally impleaded. The decree and judgment were challenged before District Court, Thiruvananthapuram in A.S. 264 of 1989 by defendants 2 to 4. Learned District Judge, on reappreciation of evidence found that Mohammed Ilias died in 1947 as admitted in the plaint and the fact that appellant was born only in 1949 is also admitted and therefore appellant could not be the son of Mohammed Ilias as he died in 1947. Learned District Judge also found that in Exts.X1 to X3 the front page of the SSLC book, the admission register extract of the school as well as the relevant entry in the service book, appellant is shown as not the son of Mohammed Ilias but Aliyarkunju the second husband of 9th defendant and therefore appellant is not entitled to a share in the plaint schedule properties. Appeal was allowed and the suit was dismissed. It is challenged in the second appeal.

5. The second appeal was admitted formulating the following substantial questions of law.

1) Whether a marriage between a Muslim male and a Hindu female is void or irregular.

2) Whether issues of such marriage are legitimate or illegitimate.

3)Whether such issues are entitled to inherit the assets of the father.

6. Learned counsel appearing for the appellant and respondents were heard.

7. The argument of the learned counsel appearing for appellant is that even though in the plaint it was specifically pleaded that defendants 8 and 9 are the widows and appellant the only son born to Mohammed Ilias and marriage of 9th defendant with Mohammed Ilias was in 1120 M.E and they were residing together as man and wife at House No. T.C. 13 of Poojappura ward of Thiruvananthapuram, in the written statement the fact that they were residing together as man and wife at House No. T.C. 13 of Poojappura ward of Thiruvananthapuram, was not denied and the denial was only with regard to the factum of marriage and the status of 9th defendant as the widow and the plaintiff as the son and not the case that Mohammed Ilias and 9th defendant were living together as husband and wife in house No.T.C.13 of Poojappura ward. It

was also argued that 8th defendant, admittedly the first wife of deceased Mohammed Ilias, in her written statement admitted that Mohammed Ilias had married 9th defendant and appellant was born to him in that relationship and that admission of 8th defendant which is against her own interest is valid and it establish that the appellant was born to Mohammed Ilias in 9th defendant, his second wife. It was also argued that though trial court properly appreciated the evidence, first appellate court on the basis that Mohammed Ilias died in 1947 and as per Ext.A3, appellant was born in 1949, held that appellant is not the son of Mohammed Ilias. It was argued that Ext.A7, the death register extract shows the date of the death of Mohammed Ilias as 10.9.1124 and as per Ext.A8 the corresponding date of Christian era is 22.4.1949 and not 1947 and Ext.A9 settlement deed executed by Zainam Beevi, the mother in favour of first defendant and Mohammed Ilias on 4th Karkidakom 1123 corresponding to 1948 establish that Mohammed Ilias was alive in 1948 and therefore finding of the first appellate court that appellant is not the son of Mohammed Ilias is unsustainable. It was also argued that evidence establish that after the death of Mohammed Ilias, 9th defendant married Aliyar Kunju and therefore in the school register his name was shown as the father and this aspect was clearly explained and proved by the

evidence and in such circumstances first appellate court should not have interfered with the decree granted by the trial court. Learned counsel also argued that though this court in **Chellamma V. Parakal Hamza** (ILR 1988 (1) Kerala 79) has held that marriage of a Hindu female with a Muslim male is a fasid marriage and the widow is not entitled to inherit the estate of the deceased husband, question whether the child born in that relationship will inherit the estate of the father was not considered and first appellate court wrongly relied on the decision to hold that appellant is not entitled to a share in the plaint schedule properties. Relying on the decision of this court in **State of Kerala V. Jose** (1989(1) KLT 296)it was argued that Ext.A3, the birth register extract a public document establish that Mohammed Ilias is the father of appellant and under Section 35 of Indian Evidence Act the entries in the birth register, which is a public document, is relevant and admissible and it establishes that appellant is the son of Mohammed Ilias. Relying on Principles of Mohammedan Law by Mulla, learned counsel argued that even if the marriage of Mohammed Ilias with 9th defendant is a fasid marriage the child born in that wedlock is legitimate and therefore appellant is entitled to inherit to the estate of Mohammed Ilias.

8. Learned counsel appearing for respondents argued that

even though it was specifically contended by defendants that there was no marriage between Mohammed Ilias and 9th defendant, no evidence was adduced to prove the marriage and the marriage of a Muslim male with a Hindu woman is a void marriage. Relying on the decision of a learned Single Judge of High Court of Madras reported in **Abdul Rahim V. Julaiga Beevi** (2001(3) KLT Short notes Case No.2 Page 2) it was argued that a Muslim cannot marry an idolatress or fire worshipper and a Hindu woman comes within the category of idolatress or fire worshipper and therefore the marriage is void. Learned counsel relying on the decision of this court in Chellamma's case (supra) argued that as the marriage is void, the child born in such a marriage is only illegitimate and will not inherit to the estate of Mohammed Ilias and first appellate court rightly held that appellant is not entitled to any share. Learned counsel further argued that in his service records appellant himself has shown Aliyar Kunju as his father and Ext.X1 to X3 fortifies the conclusion that it is not Mohammed Ilias but Aliyar Kunju who is the father of the appellant and therefore appellant is not entitled to inherit to the estate of Mohammed Ilias and being the brother only first respondent is entitled to his estate and therefore appeal is only to be dismissed.

9. Plaint A schedule property admittedly originally

belonged to the mother Zaina Beevi. Mohammed Ilias and first defendant are her only children. Zaina Beevi gifted plaint A schedule property to her son Mohammed Ilias. Hence it was his absolute property. On his death, it will devolve on his legal heirs as provided under Muhammedan Law. Plaint B schedule property admittedly belonged to Zaina Beevi. On her death it admittedly devolved on her legal heirs. If appellant is the son of Mohammed Ilias, being the son of the predecessor son he is entitled to half share and being the son first defendant is entitled to the other share. If appellant is not the son of Mohammed Ilias, only first defendant is entitled to the plaint B schedule property. The fact that 8th defendant is the widow of Mohammed Ilias was not disputed. 8th defendant in her written statement admitted the case of appellant that Mohammed Ilias had married 9th defendant and appellant was born to him in 9th defendant. Ext.A3 birth register extract of the appellant shows that Mohammed Ilias is the father and 9th defendant is his mother. Under Section 35 of the Indian Evidence Act, being a public document the entries in Ext.A3 is relevant to resolve the dispute involved in the case. Though respondents have denied the case of appellant that Mohammed Ilias had married 9th defendant and appellant is the child born in that marriage, the specific pleading in the plaint that Mohammed Ilias and 9th defendant were living

as husband and wife in House NO.T.C.13 of Poojappura Ward was not denied in the written statement. It is in such circumstances trial court found that deceased Mohammed Ilias had married 9th defendant and appellant is the child born in that wedlock. Though first appellate court found that Mohammed Ilias died in 1947 and so appellant born in 1949 cannot be his son as rightly pointed out by learned counsel for appellant. Ext.A7 and A8 establish that he died in 1949 and not 1947. Hence the finding of the first appellate court on that ground is not sustainable.

10. Though it was contended that marriage of 9th defendant and Mohammed Ilias was not proved, as rightly argued by the learned counsel for appellant, the fact that they were living together as husband and wife was not denied. As marriage under Mahomedan Law is only a contract and not dependant on any ceremony, failure to prove the ceremony is not fatal. Even if the marriage was not in the presence of two male witnesses, it will not make the marriage void, but only irregular as provided in para 254 of Principle of Mohamedan Law by Mulla. Moreover in the absence of direct proof, a marriage can be presumed from prolonged and continued cohabitation. Mulla's Principle of Mohamedan Law at para 268 (page 291 of 18th edition) reads.

> “268. Presumption of marriage - Marriage will be presumed, in the absence of direct proof, from -
> (a) prolonged and continual cohabitation as husband and wife (g); or ,
> (b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided all the conditions of a valid acknowledgment mentioned in sec.344 below are fulfilled (h); or,
> (c)the fact of the acknowledgment by the man of the woman as his wife(i).

Admission of 8th defendant widow and the evidence establish that Mohammed Ilias and 9th defendant were lilving together under one roof as husband and wife which was not disputed. Hence even if there is no direct proof for the marriage, prolonged and continued cohabitation as husband and wife prove the marriage of Mohammed Ilias with 9th defendant.

11. The crucial question is whether the marriage of a muslim Male with a Hindu female is void. A learned Single Judge(as his Lordship then was) in Chellamma's case (supra) had considered this aspect. That was a case where a Hindu widow had claimed share in the property of the deceased Muslim husband. The question whether her marriage is void (batil) or fasid(irregular) was considered by His Lordship. Relying on Principles of Mohammedan Law by Mulla it was held that an important concept with regard to marriage is the distinction made by islam between Kitabi(scriptural) and ghayr-kitabi(non-scriptural) religions and a Hindu woman comes within the category of idolatress or a fire worshipper. Though opinion of Dr.Tahir Mohammed in his book “The Muslim law of India” was cited where it is stated that some schools of Islamic Law do permit the marriage of a Muslim with a non Muslim in accordance with Islamic Law and such a marriage, under the legal theory of those schools is to be govered by Islamic Law, it was held that even if that opinion was accepted as the correct law, it is difficult to hold that marriage between Chellamma and Ummer was a valid one. Holding that there is no case that the marriage in between Chellamma and deceased Ummer was held in accordance with the principles of Islamic law, it was found that it is not a valid marriage and therefore the widow is not

entitled to inherit the estate of deceased Ummer. As Chellamma did not have an issue the question of inheritance of the issue born in such a marriage was not considered in that decision.

12. The learned Single Judge of Madras High Court in Abdul Rahim's case (supra) also did not consider the legitimacy of the child born in such a marriage or the right of inheritance of the child to the estate of the father, even though the marriage of the Hindu wife was held void as she belongs to idolatress or a fire worshipper.

13. Under Mohammedan law marriage is a contract. Mullas Principles of Mahomedan Law 18th Edition at page 282 para 250 defines marriage as follows:-

> " Marriage(Nikah) is defined to be a contract which has for its object the procreation and the legalizing of children.
>
> "Marriage according to Mohamedan law is not a sacrament but a civil contract".

Essentials of a marriage is dealt with in para 252 (at page 253). It reads:-

> " It is essential to the validity of a marriage that there should be a proposal

> made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohamedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential".

Mahomedan law does not bar marriage of a Mohamedan with a non-Mohamedan. Para 259 (at page 287) deals with difference of religion. It reads:-

> "259(1) Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a kitabia, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire worshipper, is not

void but merely irregular".

It is on the basis that Hindu is an idolatress or a fire worshipper and a Mahomedan male can only contract a valid marriage with member of another religion other than a kitabia, it was held in Chellamma's case that such a marriage is not valid.

14. 9th defendant admittedly was a Hindu at the time of her marriage with Mohammed Ilias. Therefore there cannot be a valid marriage between a Mahomedan male and Hindu female. The question is what is the effect of such a marriage.

15. Under the Mahomedan law there are three types of marriages. In para 253 at page 284 they are dealt with. It reads :-

> 253. "Valid, Irregular and Void Marriages "- A marriage may be Valid (sahih), or irregular (fasid) or void from the beginning(batil)".

16. Learned counsel appearing for respondents pointed out that in the earlier editions of Mullas Principles of Mahomedan Law, fasid marriage was shown as invalid marriage and not irregular marriage as has been shown in the subsequent editions and as per the correct translation of the Arabic word "fasid marriage" can only mean invalid marriage and an invalid marriage could only be a void marriage.

17. The 6th edition of Principles of Mohamedan Law by Mulla at para 200 at page 162 deals with the difference of religion. It reads:-

> "a Mahomedan male may contract a valid marriage not only with a Mahomedan woman but with a kitabia, that is a Jewess of a Christian, but not with an idolatress or a fire worshipper. If he does marry a idolatress or fire worshipper the marriage is not void(batil) but merely invalid(fasid)".

Paragraph 204A at page 164 deals with the distinction between void (batil) and invalid(fasid) marriages. It provides that a marriage which is not valid may be either void(batil) or invalid (fasid). A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpectual and absolute. Thus a marriage with a man prohibited by reason of consanguinity (as provided in para 201) or affinity (as provided in para 202) or fosterage (as provided in para 203) is void as prohibition against marriage with such woman is perpectual and absolute. An invalid marriage (fasid marriage) is one which is not lawful in itself but unlawful "for something else" as where the prohibition is temporary or relative or when the invalidity arises from an accidental circumstance such as absence of

witness. Para 204(3) at page 165 reads:-

> "Thus the following marriages are invalid, namely, (a) a marriage contracted without witnesses, (sections 196-197); (b) a marriage by a person having four wives with a fifth wife (S.198); (c), a marriage with a woman who is the wife of another, (S.198A); (d) a marriage with a woman undergoing iddat (S.199); (e), a marriage prohibited by reason of difference of religion (S.200); (f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried(S.204)".

The reason why the aforesaid marriages are invalid and not void are also provided. With respect to the marriage prohibited by reason of difference of religion, it reads:-

> "(e) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting a Muslim faith".

Therefore even though marriage of Mohamedan male with a Hindu woman is not valid, it is not void but only fasid. Fasid was

described as invalid, in the 6th edition as well as 8th edition. In 6th Edition at para 197, 199 and 200 “fasid” marriage is stated as invalid. So also in para 197, 199 and 204A of 8th edition also fasid is stated as meaning invalid. But in the 10th edition, a change has been made to the meaning of fasid marriage. In paragraph 196A valid, irregular and void marriages are dealt with. It reads:-

> “A marriage may be valid(sahih)
> or irregular(fasid) or void from the
> beginning(batil)”.

From 10th edition onwards fasid marriage is stated as irregular marriage when earlier it was invalid marriage. But there is no change with regard to the effect of a fasid marriage from 6th Edition onwards.

18. As Mohamedan law clearly distinguishes between a valid marriage(sahih), void marriage(batil), an invalid/irregular marriage(fasid), it cannot be stated that a batil(void) marriage and a fasid(invalid/irregular) marriage is the same. Effect of batil(void) marriage is that it is void and does not create any civil rights or obligations between the parties. So also the offspring of a void marriage are illegitimate(para 204A of 6th and 8th Editions and para 204A(3) of 10th Edition and 264(3) of 18th edition). Therefore the marriage of the 9th defendant with Mohammed

Ilias cannot be a void marriage but only a fasid marriage.

19. Evidence establish that appellant was born to that marriage. The question is what is the status of a child born in that marriage. Whether it is legitimate or illegitimate. When the offspring of a batil marriage is illegitimate, it is not the case with a fasid marriage. The offspring is legitimate.

20. Chapter XIV of all editions of Principles of Mahomedan Law deals with marriage, dower and divorce and parentage. In the 6th edition at para 206 effects of an invalid(fasid) marriage has been dealt with. It reads.

> "1)An invalid marriage has no legal effect before consummation.
>
> 2) If consummation has taken place wife is entitled to dower (proper under S.220 or specified(S.218), whichever is less) and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties".

In the 8th edition the effects of a fasid marriage is dealt in para 206 (at page 173). As in the 6th edition, it is stated that children conceived and born during the subsistence of a fasid marriage are legitimate as in the case of a valid marriage. The same position has been followed in the subsequent editions also, except that instead of invalid marriage, from 10th edition onwards it is stated as irregular marriage. Whatever it be, the legal effect of a fasid marriage (irregular or invalid) is that though the wife if there was consummation, is entitled to get dower, is not entitled to inherit to the properties of the husband. But the child born in that marriage is legitimate just like the case of a valid marriage, and is entitled to inherit the property of the father.

21. In Amar Ali's Mohamedan Law also the same principle has been enunciated. In the 5th edition (2004) at page 1305, learned author deals with marriage of a Mohamedan male with a Hindu woman and the question whether the children born for them is legitimate or not. It reads “It has sometimes been supposed that when a Muslim marries a non-scriptural woman, in order that the marriage may be valid, she must first adopt islam. This was apparently the governing idea in **Abdool Razak** V. **Agha Mohammed Jaffer Bindamin** (1893 IL 21 Calcutta 666). The notion however is erroneous. If there is an actual

marriage subsequent adoption of the Islamic Faith would make the union valid and no fresh ceremony would be needed". The learned author also dealt with the legitimacy of the children at page 1211. It reads as follows.

> "The subject of invalid marriages, unions that are merely invalid(fasid)but not void (batil)ab initio under the Sunni Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriage are without question legitimate according to all the sects.
>
> For example, if a man were to marry a non-scriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate".

22. Therefore the legal position is clear. Eventhough 9th defendant was a Hindu woman and her marriage with Mohamed Ilias was a fasid marriage, as appellant was born to Mohamed Ilias in 9th defendant, appellant is a legitimate son and is entitled to inherit to the estate of his father and therefore entitled to the share. But 9th defendant is not entitled to inherit to the estate of Mohammed Ilias, as her marriage is fasid(invalid or irregular) and she has no case that after marriage she was converted to Islam and under Mahomedan Law, even after consummation a fasid marriage do not create mutual rights of inheritance between the parties. Hence in the plaint A schedule property 8th defendant being the widow is entitled to 2/16 shares and appellant 14/16 shares. In the plaint B schedule property being the only son of the predeceased son of Zainam Beevi, appellant is entitled to one half right and being the son, first defendant is entitled to the remaining one half right. In the preliminary decree passed by the trial court, appellant was alloted 14/16 shares in plaint A schedule property and ½ share in the plaint B schedule property. It is perfectly correct. The decree and judgment of the first appellate court is therefore set aside.

23. Appeal is allowed. The decree and judgment passed in A.S.264/1989 is set aside. The preliminary decree passed in

O.S.144 of 1984 is confirmed with the modification that 8th defendant is entitled to 2/16 shares in the plaint A schedule property.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-